UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, et al.,	.	
Plaintiffs,	.	Case No. 24-cv-04055
vs.	.	Newark, New Jersey
	.	October 10, 2024
APPLE INC.,	.	
Defendant.	.	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LEDA DUNN WETTRE
UNITED STATES MAGISTRATE JUDGE

This transcript has been reviewed and revised in accordance with L. Civ. R. 52.1.

APPEARANCES (the parties appeared via video conference):

For the United States:

JONATHAN LASKEN, ESQ.
Department of Justice
Antitrust Division
450 Fifth Street NW, Suite 8600
Washington, DC 20530
(202) 598-6517
jonathan.lasken@usdoj.gov

AARON MICHAEL SHEANIN, ESQ.
DOJ-ATR
Antitrust Division
450 Golden Gate Avenue, Suite 10-0101
San Francisco, CA 94102
(415) 436-6660
aaron.sheanin@usdoj.gov

Audio Operator:

Transcription Service:

KING TRANSCRIPTION SERVICES, LLC
3 South Corporate Drive, Suite 203
Riverdale, NJ 07457
(973) 237-6080

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

(APPEARANCES continued)

For the United States:

JESSICA TATICCHI, ESQ.
DOJ-ATR
Antitrust
450 Fifth Street, NW
Washington, DC 20530
(202) 705-5900
jessica.taticchi@usdoj.gov

JOHN ANDREW RUYMANN, ESQ.
Office of the US Attorney
402 East State Street, Suite 430
Trenton, NJ 08608
(609) 989-2190
john.ruymann@usdoj.gov

LORRAINE VAN KIRK, ESQ.
DOJ-ATR
450 Golden Gate Avenue, Suite 10-0101
San Francisco, CA 94102
(202) 826-8830
lorraine.vankirk@usdoj.gov

For the State of New Jersey and Plaintiff-States:

ISABELLA REGINA PITT, ESQ.
New Jersey Attorney General
124 Halsey Street, 5th Floor
Newark, NJ 07102
(201) 912-7444
isabella.pitt@dol.lps.state.nj.us

For the State of New Jersey and Plaintiff-States:

BRIAN FRANCIS MCDONOUGH, ESQ.
State of New Jersey
Division of Law
124 Halsey Street
Newark, NJ 07101
(973) 648-2482
Brian.McDonough@law.njoag.gov

(APPEARANCES continued)

For the Defendant:

LIZA M. WALSH, ESQ.
Walsh Pizzi O'Reilly Falanga LLP
Three Gateway Center
100 Mulberry Street, 15th Floor
Newark, NJ 07102
(973) 757-1100
lwalsh@walsh.law

DOUGLAS E. ARPERT, ESQ.
Walsh Pizzi O'Reilly Falanga LLP
Three Gateway Center
100 Mulberry Street, Suite 1500
Newark, NJ 07102
(973) 757-1042
Darpert@walsh.law

WINN ALLEN, ESQ.
Kirkland & Ellis, LLP
301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 389-5078
Winn.allen@kirkland.com

MARY MILLER, ESQ.
Kirkland & Ellis, LLP
301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 389-3277
Mary.miller@kirkland.com

JULIAN W. KLEINBRODT, ESQ.
Gibson Dunn
One Embarcadero Center, Suite 2600
San Francisco, CA 94111-3715
(415) 393-8382
Jkleinbrodt@gibsondunn.com

For the Nonparty Samsung Electronics America, Inc.:

MICHAEL W. SCARBOROUGH, ESQ.
Vinson & Elkins
555 Mission Street, Suite 2000
San Francisco, California 94105
(415) 979-6935
Mscarborough@velaw.com

(APPEARANCES continued)

For the Nonparty Microsoft Corp.:
ALEX A. PARKINSON, ESQ.
Kellogg, Hansen, Todd, Figel & Frederick, PLLC
Sumner Square
1615 M Street NW, Suite 400
Washington, DC 20036
(202) 326-7961
Aparkinson@kellogghansen.com

For the Nonparty Google LLC:
JOHN E. SCHMIDTLEIN, ESQ.
Williams & Connolly LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5901
Jschmidtlein@wc.com

For the Nonparty Match Group, Inc.:
DOUGLAS J. DIXON, ESQ.
Hueston Hennigan, LLP
620 Newport Center Drive, Suite 1300
Newport Beach, CA 92660
(949) 226-6741
ddixon@hueston.com

For the Nonparty JPMorgan Chase Bank, NA:
MARC A. GOLDMAN, ESQ.
Massey & Gail LLP
The Wharf
1000 Maine Avenue SW, Suite 450
Washington, D.C. 20024
(202) 652-4511

For the Nonparty Meta Platforms, Inc.:
KEVIN J. ORSINI, ESQ.
Cravath Swaine & Moore LLP
Two Manhattan West
375 Ninth Avenue
New York, NY 10001
(212) 474-1596
Korsini@cravath.com

(APPEARANCES continued)

For the Nonparty PayPal, Inc.:
MATTHEW CANTOR, ESQ.
Shinder Cantor Lerner LLP
14 Penn Plaza, 19th Floor
New York, NY 10122
(646) 960-8606
matthew@scl-llp.com

For the Nonparty Capital One Financial Corporation:
PATRICK HEIN, ESQ.
A&O Shearman
140 New Montgomery
San Francisco, CA 94105
(415) 616-1218
Patrick.hein@aoshearman.com

BENJAMIN GRIS, ESQ.
A&O Shearman
1101 New York Avenue, NW
Washington DC 20005
(202) 508-8011
Ben.gris@aoshearman.com

MAUREEN THERESA COGHLAN, ESQ.
Archer & Greiner, PC
1025 Laurel Oak Road
Voorhees, NJ 08043
(856) 354-3034
mcoghlan@archerlaw.com

(Commencement of proceedings)

THE COURT: Okay. Good morning, everyone. I am Magistrate Judge Wettre.

We are here in U.S. v. Apple, 24-cv-4055, for purposes of a hearing on some discovery issues that were raised in counsel's joint -- the parties' joint submission of September 20th, 2024, at ECF 117.

Let me now take appearances for the record.

And may I have appearances for the United States first.

MR. LASKEN: Yes, Your Honor. Good morning.

May it please the Court, Jonathan Lasken, counsel for the United States.

And with me today is Mr. Andy Ruymann, Ms. Lorraine Van Kirk, Mr. Aaron Sheanin, and Ms. Jessica Taticchi.

THE COURT: Good morning to all. Good morning.

And for the Plaintiff-States, who do I have?

(Simultaneous conversation)

THE COURT: I see you, Ms. Pitt. I'll give your appearance for you, since you have an echo.

I see Isabella Pitt for the Plaintiff-States.

And do I have Mr. McDonough? Oh, I see Mr. McDonough. But he's muted.

Just unmute and give your appearance.

Oh, you're muted again.

MR. MCDONOUGH: Good morning, Your Honor. Brian McDonough for the Plaintiff-State of New Jersey and the Plaintiff-States.

THE COURT: Good morning to you.

MR. MCDONOUGH: Good morning, Your Honor.

THE COURT: And for defendant Apple?

Ms. Walsh, you're muted.

MS. WALSH: I apologize.

Liza Walsh and Doug Arpert from the Walsh firm.

And with us, we have Winn Allen from Kirkland & Ellis and Mary Miller, also from Kirkland & Ellis. And Julian Kleinbrodt from Gibson Dunn.

THE COURT: Okay. Good morning to all and welcome.

And for nonparty Samsung?

MR. SCARBOROUGH: Good morning, Your Honor. This is Mike Scarborough with Vinson & Elkins for nonparty Samsung Electronics America, Inc.

THE COURT: Good morning.

And for nonparty Microsoft?

MR. PARKINSON: Good morning, Your Honor. Alex Parkinson from Kellogg Hansen on behalf of Microsoft.

THE COURT: Good morning.

And for nonparty Google?

MR. SCHMIDTLEIN: Good morning, Your Honor. John

Schmidtlein, Williams & Connolly, for Google LLC.

THE COURT: Good morning.

And for nonparty Match?

MR. DIXON: Good morning, Your Honor. Doug Dixon of Hueston Hennigan for nonparty Match Group.

THE COURT: Good morning.

And for nonparty JPMorgan Chase.

MR. GOLDMAN: Good morning, Your Honor. Marc Goldman from Massey & Gail for JPMorgan Chase Bank, NA.

THE COURT: Good morning.

And for nonparty Meta?

MR. ORSINI: Good morning, Your Honor. Kevin Orsini, Cravath Swaine & Moore, on behalf of Meta.

THE COURT: Good morning.

And for nonparty PayPal.

MR. CANTOR: Good morning, Your Honor. Matthew Cantor from Shinder Cantor Lerner for nonparty PayPal, Inc.

THE COURT: Are you joined by Mr. Hall this morning or not?

MR. CANTOR: I believe I am.

Mr. Hall?

THE COURT: Okay. I'll just -- I had him on my emailed appearance sheet.

For nonparty Capital One?

MR. HEIN: Good morning, Your Honor. Patrick Hein

of A&O Shearman for nonparty Capital One Financial Corporation.

THE COURT: Okay. And are you joined by colleagues for Capital One?

MR. HEIN: I am, Your Honor. I am joined by Ben Gris of A&O Shearman and Maureen Coghlan, as local counsel.

THE COURT: Okay. Good morning to all of you.

So that's all I have.

Did I miss anybody? Okay.

So, as I said, we're here to have a hearing on a joint submission from the parties. And that joint submission concerns the parties' differences with respect to three proposed orders: One is a protective order, which we call, around these parts, a "discovery confidentiality order" because it really pertains to discovery. It won't control court filings, and it won't control trial. And, secondly, an ESI protocol. And, third, a source code protocol.

I have also reviewed carefully the submission of third party Samsung Electronics America on the protective order. And that's at ECF 123.

I know that I also received submissions late on October 8th from Google; Match Group, Inc.; and a group comprised of Capital One Financial Corporation, Garmin International, JPMorgan, Meta, Microsoft, and PayPal at ECF 154, 156, and 157.

And just to be candid, I like to read everything carefully. I was very, very busy yesterday. And I just had time to skim those letters. But I have a working familiarity with what's in them.

So I'd like to start by just addressing the issues as they were presented in the order in which they were presented in the parties' joint submission and dive right into it.

I should pause, though, to ask the parties if there have been any developments since you submitted the letter on September 20th that might obviate any of the issues.

So Government -- either States or federal government, please let me know.

MR. LASKEN: Your Honor, I am not aware of anything that has obviated the issues. We have worked with the third parties to avoid some issues that the Court would have to resolve, and we'll propose one small addition to the source code protocol. We could do that now or later.

THE COURT: Okay. Why don't we wait a little bit. Okay. Thank you.

And is the same true from Apple's perspective, that nothing -- no issue has really been eliminated since the joint letter was submitted?

MR. ALLEN: Good morning, Your Honor. This is Winn Allen from Kirkland on behalf of Apple.

That is still our view, that nothing's been eliminated, although we, like you, just received the various nonparty submissions the other evening, and we're reviewing those. And there might be an opportunity for us to have a discussion with those nonparties to reach some type of agreement and to work those out. We just haven't had an opportunity to do that since --

THE COURT: Right. Okay. Well, spoiler alert: Most of what I'm going to do today is to give you my impressions of the issues you submitted and send you back to the drawing board, and when you go back to the drawing board, you should liaise with the third parties to see if you can address their concerns.

And some of the things I say may at least partially address the third parties' concerns. Okay?

Okay. Let's go right into the first issue, which is each of the orders has a definition of "parties." And there's a dispute as to what that definition should be.

The way I see this issue, it seems like an advance battle as to the scope of discovery on -- as to who is the plaintiff. Obviously, the caption says that the lead plaintiff is the United States of America. And, you know, the Government raises issues about should that be -- should Apple be able to serve discovery requests on any agency or subdivision of the United States as if it were a party? And

I guess that would apply to Rule 34 requests, deposition notices, and the like.

And the same with the States, the analogue being, you know, should every subdivision of every Plaintiff-State be open to party discovery?

And I'm, frankly, not sure this is an issue that really needs to be decided for purposes of these orders with the one exception of the ESI order because I think the scope of preservation and ESI collection does raise the issue of, you know, which federal and state agencies need to be preserving information and collecting ESI.

But aside from that, I guess I was curious, first of all, why, given that the Government has expressed from the beginning of this case that it seeks to move the case as expeditiously as possible in the public interest, why would the Government want any agency treated as a nonparty where they would have to be subpoenaed and there could be motions to quash? Why isn't the Government just focusing on the proportionality prong of Rule 26 with regard to discovery and saying, you know, to use the Government's hypothetical, well, you can't seek this information from NASA. That's way outside the scope of antitrust. You know, I'd be hard-pressed to believe that the Department of Justice doesn't have control under the possession, custody, and control standard of any agency of the United States.

So let me pause there and just ask, what is the Government's ultimate concern here?

MS. VAN KIRK: Good morning, Your Honor. Lorraine Van Kirk.

THE COURT: I see you, Ms. Van Kirk.

MS. VAN KIRK: Thank you.

Your Honor's absolutely right that there's no dispute between the parties about who's in the case caption. And that's properly the United States and the Plaintiff-States acting by and through their respective Attorneys General.

But it is deeply important to the Government and the law is clear that public party discovery is limited to the agency that participated in investigating and bringing the case. And that's true in civil cases. That's true in criminal cases. And holding otherwise would explode party discovery in public actions. We believe it would impose unjustifiable and unworkable burdens. And this case was investigated by the antitrust division. There were --

(Simultaneous conversation)

THE COURT: Ms. Van Kirk, let me ask you. Not including a particular agency in the definition of "party" doesn't mean that Apple can't seek discovery from them. It just means that it will take longer and possibly be subject to a different standard, you know, a subpoena under Rule 45

where there's a duty not to unduly burden third parties.

But otherwise Rule 45 incorporates Rule 26 standards.

So what's the difference ultimately?

MS. VAN KIRK: Respectfully, Your Honor, we believe it would take much longer and be much more onerous if potentially the entire government was subject to party discovery. Senior executives of federal and state agencies shouldn't need to preserve all their emails due to the pendency of this litigation.

THE COURT: Well, that's a different issue. And I will address that. I agree that that needs -- it needs to be defined for purposes of preservation.

MS. VAN KIRK: Thank you, Your Honor.

Similarly, our interrogatory responses shouldn't need to collect a vast array of information from across the entirety of the federal government and state governments.

Our party meet-and-confers won't involve other federal and state agencies.

There are over 400 federal agencies and nearly four million federal employees. Apple's proposal would impose massive expenses, paid for by taxpayers. It would debilitate and chill public enforcement actions, especially against well-resourced companies like Apple.

THE COURT: Okay. Let me ask a representative of

the States if they wish to be heard separately from Ms. Van Kirk on this.

MR. MCDONOUGH: We do, Your Honor. Brian McDonough speaking on behalf of New Jersey and the States.

And, you know, first of all, we concur and join in all of Ms. Van Kirk's comments.

In addition, with respect to Your Honor's concern about whether treating the state agencies as nonparties, which, in fact, they are, is going to slow down discovery, we don't think that is necessarily the case. What has happened in other cases -- at least I speak for New Jersey; I can't speak for all the States -- but if the defendants want to serve third-party subpoenas upon a particular agency, we put them in touch with the deputy within the Division of Law who counsels that agency. They generally accept service and meet and confer with respect to compliance with the subpoena. And to the extent there are any concerns regarding overbreadth of the subpoena, those would arise whether that agency is treated as a party or a third party.

So we do not think that this is going to appreciably slow down discovery. But, you know, treating these agencies as parties, as DOJ noted, could explode the amount of resources that are required to prosecute this case on the state level if we were required to spend the next several weeks running around serving lit-holds on hundreds,

if not thousands, of state agencies, issuing authorities, trusts, councils, you name it, who are complete strangers to this action and, frankly, did not know that this action was even being filed until they heard about it on the morning news.

THE COURT: I understand.

And I wouldn't ask the government which agencies it did issue the litigation holds. But litigation holds have long been triggered. So it is known who -- at least by the respective governments, who is subject to a lit-hold. And, perhaps, in the future, when there is formal discovery opened and discovery requests are served, both Apple and the government will have to confer about the extent of, you know, the government's preservation requests, who is preserving information. And, frankly, Apple has a lot of knowledge, I would assume, from the investigation that preceded this case as to what agencies it will be seeking discovery from, and it will have to be transparent about who should be preserving information, who should be subject to ESI searches, or it won't be heard later to complain about spoliation if something wasn't preserved.

So that's just a little preview of how I see it.

Let me hear from Apple on this issue.

MR. ALLEN: Good morning, Your Honor. This is Winn Allen on behalf of Apple.

Look, we do believe that at the appropriate time, there is a reasonable scope of discovery that we can pursue from relevant federal and state agencies. We do not intend to subpoena or seek discovery from 400 federal or state agencies, but we do believe there's a universe of relevant material that we would like to seek. We do believe that that is properly party discovery and that State AGs' Offices and DOJ will be found to have control over those materials.

But the key point for present purposes is we very much agree with Your Honor that that's a question that can and should be resolved when the actual discovery requests are served on various state and federal agencies. That's the context in which courts, at least that we've found, have analyzed this question.

And our concern is it's premature, in the context of negotiating these baseline case organization and discovery agreements, to just decide once for all that neither DOJ nor State AGs' Offices have any responsibility at all to collect and produce documents from relevant federal and state agencies. That's a determination that we think should be made after we issue specific requests directed to specific agencies, and then the Court, in that context, if there's still a disagreement as to whether it's Rule 34 discovery or Rule 45 discovery, can then decide in that context whether the control standard is met. We just don't think it should

be done in the context of these baseline discovery documents.

THE COURT: Yeah. I mean, I agree with that because I'm all about practicality and moving the case to the next step, and then we can take up issues as they arise in context.

But I did -- I was curious and I'm grateful to everyone for spelling it out a little bit for me, just to have a sense of what's coming in the future.

But I absolutely think, looking carefully at each of these orders, that you can define "parties" for purposes of the needs of the order and just limit the definition to say, "for purposes of this order, 'parties' shall mean." That's a way to bypass it.

I think on the source code protocol, that's easy. Most of the action on that protocol refers to "producing party" and "receiving party," and you'll know who those are.

And with the protective order, it almost doesn't matter.

I do still think it matters on the ESI order. So I'm going to direct the parties to meet and confer in good faith on that, to define the scope of preservation of ESI. And, you know, that involves a good deal of transparency on both sides. And at this point in the litigation before you know each other -- and maybe never in this litigation -- there isn't a lot of trust. But I'm going to force you to do

it anyway, because I'll take you to task if you've made my job harder because you haven't been transparent, you haven't been flexible, and you haven't worked with one another.

The meet-and-confer requirement's important everywhere. In New Jersey, we rely upon it because we're such a busy District. And it doesn't mean sending a CYA email to someone. It means having a real meeting.

And I'll check your bona fides as to what the meet-and-confer consisted of and who said what and who was willing to do what. But you need -- you're going to have to need -- you're going to need to go back on the ESI order. As I said, the Government knows to whom lit-holds were issued, and it doesn't have to say, "We issued litigation holds to" -- because that may be privileged. But they can say we're preserving information from this agency, from that agency, we will ask them. You know, you can designate custodians. We'll give you custodians from those agencies and so forth. Or we're not going this far. We're not going to that agency.

And then you'll have a discussion with Apple about it.

And, you know, Apple, as I said, tell the Government -- I'm sure you have a lot plans in the works for -- to whom you're going to direct discovery requests. Tell them we expect to see ESI collected from X, Y, and Z

agency. We're expecting you to designate custodians from those agencies or permit us to pick custodians.

You all have done this before, and I have confidence in you.

But you need to go back and work on that.

MR. ALLEN: Understood, Your Honor. We will.

THE COURT: Okay. So I don't think any of the third parties had issues on the definition of parties. I think their issues came with the protective order, which we're about to go into that.

MR. ALLEN: Your Honor.

THE COURT: Am I correct about that?

Go ahead, Mr. Allen.

MR. ALLEN: One, just, point I wanted to make. You had asked earlier, had there been any updates to -- that the parties had discussed. There is one that I forgot, which was --

THE COURT: Okay.

MR. ALLEN: And this goes to the nonparty, but my understanding from speaking to counsel for the Government is that some nonparties -- I am not sure who -- had expressed concern that the source code protocol that the parties had negotiated might be deemed to govern them.

And that was not our intention. We were negotiating a source code protocol for Apple specifically.

And so I believe -- and the Government can confirm -- that we've agreed with the Government that the source code protocol will just pertain to the parties to this case. And if there are third parties that have concerns about source code issues down the line, we can address that at that point in time.

THE COURT: Okay. All right. So you'll customize -- you'll specify that in the proposed order.

MR. ALLEN: We will.

THE COURT: Okay. Very good.

Anything else for third parties?

And, excuse me, I need to grab a tissue.

(Pause in proceedings)

THE COURT: All right. Okay.

So the next issue is the protective order. And, you know, without intending to be pedantic, I thought it would be useful to just set forth, you know, what the protective order governs and what you can do with the categories in the protective order.

So, you know, as I previewed when I started, the protective order or discovery confidentiality order is to facilitate the exchange of discovery by giving some measure of protection to the producing party of sensitive information.

So -- and, as you know -- and I am not inviting

disputes on this, but the producing party can unilaterally designate the category of protection under the order. And then that's subject to challenge and the normal meet-and-confer.

And so there can be some fluidity between categories. Things can be dedesignated.

And, as you all know, things often are dedesignated as you approach trial because something that's treated as confidential in discovery sometimes doesn't qualify for that treatment at trial. It makes trial very difficult in and out of the room and closing courtrooms, and, you know, there are standards, other standards besides the confidentiality order for closing courtrooms, constitutional standards.

So it's really just a discovery facilitation device. That's how I see it.

Also, you know, it doesn't -- at least specifically under our local rule on sealing, the designation of something unilaterally by parties as confidential under a protective order does not mean it automatically is treated that way by the Court when it's filed as part of a motion. We have an independent rule under Local Civil Rule 5.3, which essentially codifies the Third Circuit standards on the common law right of access to judicial filings.

So it's limited. It's -- this is how the documents will be treated in discovery.

However, it is important and I know the parties -- the Government is looking for one category in the protective order -- I've reviewed that. Apple is advocating for two.

And I have a different view of it, which I'll go through. And, again, the ultimate goal will be to get you to go back to the drawing board and to consider what I say. I am not making a ruling on this.

So here's what I see as the workable tiers of disclosure under the protective order. So, first, there's a category of internal documents, say, at Apple. They may not be the greatest corporate secrets, but they're not shared with the public, and so Apple would not feel comfortable putting those on the public docket. And there may be some similarly, slightly sensitive documents that the Government produces that it would not want put on the public docket.

However, Apple has a client, and Apple needs to confer not only with in-house counsel but business decision-makers. And I am not going -- and because there's a unilateral designation that's possible, the Government could designate every document so that Apple effectively, its outside counsel wouldn't be able to get their client's interpretation of things needed to defend the litigation. And we can't have that. There's still a client, and that needs to be respected.

So for nonpublic documents that Apple can share

with business people -- and it can be a limited group; it doesn't have to be everybody at the company. There is a litigation control group concept; maybe it's commensurate with the litigation control group -- a few officers, some in-house counsel. And that could be just designated plain "confidential."

So work on that. Let me stop there -- well, let me get through the four categories, and then I'll open it up to you. And I do foresee possibly four categories.

The second category I see is a category that's too sensitive for any business decision-maker at Apple, but that Apple's outside counsel might need to confer with its in-house counsel about, an in-house limited group who have agreed that they won't be involved in competitive decision-making for a period of time. So let's call that category "highly confidential."

And then there's a third category that I think is essential here, and it addresses a lot of the concerns of the third parties. And I thought this long before I even got Samsung's letter. As soon as I read the orders, I said there is no way a competitor of Apple is going to be willing to produce information that anyone at Apple is going to see. There needs to be, at least in the first instance, an "outside counsel-only" category.

That may not be enough. I know that -- I think it

was Google submitted a letter about whether -- well, I won't go into it because I didn't study it carefully. But there are further layers of complication that counsel may need to address with one another.

And then -- and, again, I am not inviting extra work for myself. But this case could have such broad discovery that there might need to be a customized category. You can probably think of a hypothetical. I am not going to come up with one as I sit here now. But a special designation -- sort of a miscellaneous special designation category where the parties agree to work with one another toward an agreement as to who the information can be disclosed to.

So I'm seeing three or four categories.

Let me stop there and collect your thoughts.

So, Government first.

MR. SHEANIN: Good afternoon, Your Honor. Aaron Sheanin on behalf of the United States.

We absolutely appreciate your guidance on this particular issue. And I think that we, seeing your guidance, can absolutely go back and have conversations with Apple to discuss this.

The primary concern for the plaintiffs is to make sure the competitively sensitive information from Apple's customers and its competitors is kept out of the hands of

Apple personnel who are involved in competitive decision-making. And that is, I think, consistent with what you just discussed, particularly with respect to Category 3 and, perhaps, to some extent, with respect to Category 2.

We will go back and have conversations with Apple to ensure that we meet those goals. And we will do so with the guidance and input of the third parties whose documents are at issue -- because it really is the third parties who are of most concern here, in addition, obviously, Apple has its concerns, and we respect those.

But it's more them than, say, the Government's documents and the Government's concerns.

THE COURT: Okay. I appreciate that.

Anyone from the Plaintiff-States wish to be heard?

MS. PITT: Your Honor, Isabella Pitt.

Just that we agree with the Department of Justice's decision on this, and we would engage with the meet-and-confer to see how we can narrow this issue down.

THE COURT: Okay. Thank you.

And Apple?

MR. KLEINBRODT: Good morning, Your Honor. Julian Kleinbrodt for Apple.

THE COURT: Oh, I have to find you.

Now I see you.

MR. KLEINBRODT: I --

THE COURT: Why is it dark where you are?

MR. KLEINBRODT: I'm in San Francisco; so the sun has not risen yet.

THE COURT: Oh, I'm sorry. Got you up early.

MR. KLEINBRODT: It's all right.

And I hate to just echo what everyone has said. But thank you for the guidance. It is extremely valuable. I think it makes sense, particularly, as you said, with the many late-breaking submissions that have come in for the parties and potentially interested third parties, to rediscuss these provisions in light of your guidance.

I do think that these issues -- or at least some of them -- should be resolvable -- or at least capable of narrowing. And I would, you know, just note that for the point you were making about the last category, the proposed order that we submitted, you know, provides for a modification as they come along. And that is common in large complex cases with expansive third-party discovery like this, for there to be a scope concern that may arise and for us to work those out.

So we appreciate the opportunity to do that now with the Government and third parties.

THE COURT: Okay. All right.

Let me hear from the third parties. I know they were concerned about this, and I'll let them weigh in.

Who would like to speak?

MR. SCARBOROUGH: Your Honor, this is Mike Scarborough for Samsung.

I don't have much to say here. Very much appreciate the Court's comments.

You know, probably the biggest issue, from our perspective, is the one you've addressed is that there has to be a category of information that is produced that is truly outside counsel only. I mean, this is -- this is a matter that it's not looking back at things that happened 10 years ago and then stopped five years ago. These are issues of current concern. So we definitely anticipate that there will need to be the highest level of protection for at least some of the information that Samsung produces in discovery.

And then outside of that, we appreciate the Court's comments about, you know, three or potentially four tiers here. I think it's simply a matter of tightening up the definitions, making it clear, if anyone at Apple, in-house counsel or business folks, have access to information, tightening up those definitions so that they're not vague. And I would suggest also, given the importance of nonparty information here, it would be very helpful, to the extent that there is a -- sort of a disclosure regime about who these folks at Apple are going to be approved to receive certain categories of documents, the nonparties have a voice

for any changes that are made and it's not simply an exchange between Apple and the government entities, but that nonparties at least have some visibility in any changes that go along with the sort of designated groups within Apple to receive access to information.

But other than that, I think we can -- we can weigh in and work with the parties to get to a place that works with the protective order.

THE COURT: Okay. Thanks.

And, you know, you raised one other issue which I thought was a good issue and other third parties echoed it, and that was showing a deponent information and, you know, the exception to -- basically that a deponent can be shown something with which they're familiar or however it's phrased in the protective order. And there was great concern on the part of the third parties that, say, you have a deponent from Apple and they work on apps. And it's about -- and, you know, a Samsung document concerning apps is interpreted as something that they can be shown because they're familiar with apps.

I think if that document, the third-party document, hypothetically, from Samsung is marked "outside counsel-only," you can prescribe in that category that if it's an "outside counsel-only" document, perhaps it cannot be shown to a deponent without advance notice.

So, you know, there's a way to address that because I think that's a legitimate concern. Just a suggestion.

MR. SCARBOROUGH: Thank you, Your Honor. We appreciate that. Yes.

THE COURT: All right.

And any other third parties want to weigh in?

MR. PARKINSON: Your Honor, this is Alex Parkinson from Kellogg Hansen on behalf of Microsoft, and I'll speak for a moment on behalf of the nonparty group that's signed on to Docket 157.

We greatly appreciate Your Honor's guidance. We agree that there should be an "outside counsel-only" tier and that there should be a plug on the deposition preparation loophole, for lack of a better term.

And at least speaking on behalf of Microsoft, we would be willing to engage in the meet-and-confer with plaintiffs and with Apple. You know, we were not involved in the initial construction of the protective orders. And we'd be happy to be part of that this time around, at least as it pertains to these confidentiality tiers.

One item that Your Honor mentioned in Category Number 2, which was the highly confidential category where there might be limited access to folks at Apple who are not involved in competitive decision-making, and you mentioned that those folks might not be involved in

competitive decision-making for some period of time after they're shown the nonparty documents that are in that second category, I think making sure that there is that cooling-off period from the point of disclosure going onward is important to the nonparties. That's become an increasingly common feature in protective orders, particularly in big platform-defending cases where you have in-house counsel who might move around and advise on different parts of a multi-faceted business. So we see that in the Amazon protective order that Apple cited. It's in the Google Search protective order.

And so I think it's important -- Microsoft and the other nonparties that signed on to Docket 157, that there is a cooling-off period for folks who are given access to that second tier that you described and make sure that there's not inadvertent misuse of nonparty information years after the fact.

THE COURT: All right. You'll discuss that with Apple.

MR. PARKINSON: Thank you, Your Honor.

THE COURT: All right. Any other third parties who wish to be heard? No? Okay.

All right. So sending you back to the drawing board on the protective order as well.

And there was one other aspect of the protective

order, and that was how data produced under the protective order and designated confidential or highly confidential, what kind of data security will there be at the Government to ensure it's not accessed by malicious actors.

And, of course, it is a very legitimate concern. You know, those of us who were in the government during the Solar Winds breach, it was very concerning to us that things that were sealed may have been accessed by those who should not have seen those materials.

However, I'm also sympathetic to the Government. Working for the government, I understand the Government's point that they're not necessarily able to customize their data security. The Government is subject to regulations as to how it's kept. And, you know -- and then taking a further step back -- I'm no expert in data security. I know in other big cases, they tell me about data rooms, and I presume there's a multi-factor authentication before you're permitted in them.

I was wondering if there was a workaround here that the parties could discuss. I don't know if the Government's permitted to hire an outside data room or if there's funding for that.

But it seems like you-all could come to some kind of agreement if there's a will.

So let me hear the Government on this.

MR. SHEANIN: Sure. Thank you, Your Honor.

From the Government's perspective, the data security and data breach provisions that Apple's requesting here are novel. They're extraordinary. And they're unnecessary in this public enforcement action. They're far beyond what is required in the model confidentiality order in the District of New Jersey. There is nothing really in that order that dictates how data should be securely stored.

And at best, with respect to --

THE COURT: That was drafted about 15 years ago. So maybe we haven't kept up with the times in that respect.

MR. SHEANIN: That's possible too. But with respect to breach, it's about cooperation and notification.

The United States and plaintiffs in general are highly attuned to issues of data security. The United States will host party and nonparty productions on secure government systems.

I want to say these are the same systems where we regularly store sensitive documents and data for investigations into mergers and our litigations as well that involve mergers and that involve anticompetitive conduct. And they occur in a variety of sensitive areas and industries, including defense, agriculture, media, and, yes, technology.

Apple's own documents have been stored on these

exact servers in prior matters.

THE COURT: Have you shared with Apple any information about those systems to allay their concerns that they're not sufficiently secure?

MR. SHEANIN: We have explained and it's in the letter to the Court that we comply -- that we have FISMA requirements that we comply with, that we also comply with one of the -- the most recent NIST protocol. That is, again, within the submission that we made to the Court as well, which I think is overall consistent with the kinds of concerns that Apple is raising.

But the problem, of course, is then do they want us to move beyond those points? And do they want us to tighten that security up even higher?

What I want to say here is that the applicable laws and policies with respect to the federal government take into account national security and law enforcement equities. In the event of a data breach, for example, the Department of Justice's initial priority will be to identify threats to national security, including hostile foreign actors and other hackers. And then we'll also try to identify the individuals who may be at risk of a breach.

As you pointed out, Your Honor, these concerns may prohibit the Department of Justice from doing various things that Apple is proposing. For example, we may not be able to

notify affected persons about a data breach in any particular time frame. We may not be able to disclose certain information about a data breach. And we may not be able to disclose certain sensitive information about government investigations or vulnerabilities.

And what's interesting about this particular demand in the protective order from Apple is that they also demand mandatory discovery in any potential data breach.

Now, as I pointed out, we have extraordinarily sensitive data in the United States' servers. Neither Apple nor any other private corporation is entitled to discovery into the details of those security systems, into our potential vulnerabilities, our potential countermeasures involving hackers or guest hackers. That's not information that we provide to Apple. It's not information we provide in open court, though in the event that we would need to provide something *in camera*, I'm sure that that can be discussed.

We have pointed out that we will, in the event of a data breach, comply with the regulations and obligations under the law. We will do so in connection -- that's consistent with what we've represented in our draft of the proposed protective order in paragraph 34.

But we -- our position is that Apple is really overreaching here in that the protective order should not impose requirements that are inconsistent with the applicable

law or that might jeopardize national security or law enforcement.

And, finally, I really want to point out that Apple hasn't requested this in all -- right? -- in all of its recent cases. We cited several antitrust cases, private antitrust cases, in the last four years in which Apple has not requested anything of this nature with respect to private actors -- or private plaintiffs. There are simply no data security or data breach provisions.

And if those concerns were raised subsequent, Apple has not sought, to our knowledge, you know, to revise or amend those protective orders to allow those kind of -- the kinds of provisions it's seeking here.

We think it's inappropriate under these circumstances. And the cases that they cite in support of their positions are primarily private litigations that do not have the same kinds of national security or law enforcement concerns, and the one case that they did cite that involved public enforcement, the Anthem case, we really find distinguishable, and we're happy to discuss that further if that's of interest to the Court.

THE COURT: Okay. Thank you.

Let me hear from Apple on this, please.

MS. MILLER: Thank you, Your Honor, and good morning. Mary Miller -- Apple.

Just to -- we appreciate the Court's comments, particularly about engaging on this. And I think first and foremost, just to set the table, Apple is certainly not trying to micromanage the Government's internal processes and procedures and how they respond to national security threats. I think the real issue for us is just getting a better understanding of what the Government's policies and processes are to the extent that they can share those.

And, you know, up until, really, the letter, we weren't aware and they hadn't really engaged with us about their -- the NIST protocol and that they are seeking to comply with that.

And so I would just first point out, I think more information would just be helpful and further engagement from the Government on this issue, and I think we could really work together without the Court having to intervene here.

On the letter, the representations in the letter about compliance with that NIST protocol, I would just also point out that the Government included language in there saying that there are deviations from that. And so, again, we fully understand that the Government has certain obligations with respect to public agencies and national security interests, but we just want to understand, when they say "deviations," what does that mean? And what are we talking about? What are the processes and procedures that

are really in place here?

And I think, you know -- we don't think that this is novel, as these threats continue to rise. We're seeing more and more protective orders that include provisions like this, which are cited in our letter, including Floyd v. Amazon, the In re Insulin case in this District, and other cases that Apple has agreed to protective orders with similar provisions.

And so we're not trying to ask for some novel bespoke solution here. We just think that there are certain baseline things that we could discuss and agree to, including, like, multi-factor authentication, encryption, and things like that.

Just with respect to the breach issues, I would just point out, the Government's letter includes the point that we're asking for a 48-hour notification of breach.

That's not what we're asking for. We're asking for a reasonable time, you know, fully -- again, fully aware that there are certain scenarios where 48 hours might not be feasible for the Government. And we really just want to be able to include provisions in the protective order that account for this increasing risk of data breach because, you know, the information that Apple is going to be providing, it's exceptionally importantly to Apple that that be maintained and protected.

And so to the extent that the Government has concerns about violating laws or regulations that it's subject to through those breach procedures, we just ask that they identify what those are. They're mentioned in the letter, but we still haven't heard what specifically they're referring to.

And I think there's probably additional work and engagement that could be done to reach resolution.

THE COURT: Okay. I mean, this is a very legitimate issue. A lot of what Apple has, that's its competitive edge, is intellectual property that will be produced in this case. So I will advocate that the Government adopt the most stringent security available to it.

I know the Government is limited as to what it's able to do. And to be very transparent, consistent with national security, with Apple, about how the data will be protected and what the Government will -- what the laws prescribe the Government do in the event of a breach and what it cannot do, I really don't -- and in any order I enter, I don't want to enter something on an extensive protocol and what happens in the event of a security breach. That's something that we hope never happens. And if it does, we can take it up then. I don't think we need to troubleshoot that right now.

But data security should be discussed intensely

now.

Mr. Sheanin, you wanted to say something.

MR. SHEANIN: Yeah, Your Honor, if I may.

First of all, thank you for your guidance, again, on this.

We appreciate that the data security issues are exceptionally important to Apple. They are exceptionally important to the United States as well. We are concerned about Apple's data. We're concerned about everyone else's data that's in our systems.

We will be glad to work with Apple and have more communications, particularly about our data security.

However, the extent of transparency is going to be limited, I think, to some extent. And I think Apple -- I caution Apple and I just advise the Court that Apple may want more information than we are actually able to provide about our own systems, about how we secure things.

THE COURT: Then just satisfy them that you're limited by law as to what you can tell them and show them the statute.

MR. SHEANIN: That's fine, Your Honor. We will be glad to do that.

And we appreciate, again, your guidance on all of this.

THE COURT: Oh, you're welcome. I'm full of

guidance.

All right.

Let's turn to the last issue. As Judge Bongiovanni would say, it'll make my head explode, these technological issues.

But -- all right. So this is the issue of in the ESI protocol of the production of metadata for linked documents. So I will have -- I do want to check my understanding against yours to make sure I understand this issue. And my law clerk and I have been through the cases. And we see that the law is still very much evolving in this area as technology evolves.

However, the old standards of what a resisting party to a discovery demand needs to show when it is not automatically going to produce relevant information still applies. There's a burden on Apple to show exactly what the burden is and that it cannot be obviated by existing technology. I am not going to order Apple to buy any technology -- that's outside my jurisdiction -- or to utilize any particular technology. But it will go into the mix as to whether any available technology could be used to ease Apple's burden in this regard if I'm going to require the Government to affirmatively have to request the information on a limited basis from Apple rather than Apple voluntarily providing and automatically providing all the metadata.

All right. So that's just to frame it a little bit.

But let me go through what I understand, and don't laugh at me if I have a misunderstanding, technologically about the problem that the proposals in section roman V.10 of the ESI protocol are trying to address.

So -- and I'm going to go a little bit offscript, which is always dangerous, but say we have an email dated July 1st that's produced. And the email has a hyperlink to a collaborative document.

Do you even understand my question so far? Does that make sense?

MS. WALSH: We do, Your Honor.

THE COURT: Okay. So rather than "linked documents," which is somewhat confusing, I'm going to call an underlying document where there can be multiple authors and commenters, I'll call that a "collaborative document."

So on July 1st, Jane Doe sends an email to John Smith and says, "Hey, you know, see my recent edits to collaborative document hyperlinked." If that hyperlink is still active at the time the email is produced, say in November, if you were to click the hyperlink, it would not necessarily be the collaborative document as it existed on July 1st when the email was sent because that document is always evolving. It would be whatever it evolved into as of

the date you clicked on the hyperlink.

Am I correct about that? And correct me. I'm inviting you to.

MS. VAN KIRK: Yes, Your Honor. That's correct.

In addition to not knowing if the document --

THE COURT: That's correct? I'm going to give myself a gold star.

MS. VAN KIRK: Yes, that's correct. And then there's been --

THE COURT: Oh, Raina -- I'll give Raina a gold star. Go ahead.

MS. VAN KIRK: In addition to not knowing if that document is the same version from July 1st in the hypothetical, plaintiffs wouldn't be in a position to know what that document is at all.

THE COURT: Oh, because there'll never be a link to it and the hyperlink won't work?

MS. VAN KIRK: Under defendant's proposal, for most of the linked documents like this one, when someone emails someone that document and says, "Check this out" on July 1st, plaintiffs have no way of knowing what that link was to, let alone what -- it was like on July 1st.

THE COURT: Okay.

MS. VAN KIRK: And, obviously, we need that to fact-find and litigate this case effectively.

THE COURT: So the -- but there will be discovery requests, presumably, that will be designed to get production of various iterations of the collaborative document as it was worked on; right? So that might be produced separately.

MS. VAN KIRK: Respectfully, Your Honor, it might be in the production, certainly.

THE COURT: Okay.

MS. VAN KIRK: But what it won't have is the relationship.

THE COURT: Right. And that's what the metadata would provide; so the metadata to the collaborative document would identify the document as it existed on various dates?

MS. VAN KIRK: It's exactly right that it would identify the document.

Whether it would have the July 1st version, a version control, might depend on the system.

But even identifying the document --

THE COURT: Okay.

MS. VAN KIRK: -- obviously of massive importance.

THE COURT: Okay. So it would be to match up the email, say, with the document the email was referencing.

MS. VAN KIRK: Precisely.

THE COURT: I can understand why that's important or could be important.

Let me ask Apple, then, to explain the burden in --

I know there are a lot of these links, and so, you know, it's -- it's vast. The Government is narrowing down what it is seeking to only relevant hyperlinks. It may say a lot of it is relevant; so that might not narrow the field much.

But someone from Apple walk me through technologically what's required here and what the burden is.

MS. MILLER: Thank you, Your Honor. Mary Miller again.

I'll do my best.

THE COURT: You got all the good duty today, huh, Ms. Miller?

MS. MILLER: The technological piece, I can't promise I'll be perfect.

So I think, just to level-set, the burden as identified by Apple is that there is no automated tool to connect the hyperlinked document, the collaborative document that you were talking about, to the email in the ordinary course. So when we talk about, like, attachments to emails, those are stored within the same email file, and so when you collect and produce them, they're automatically associated as family members for discovery purposes.

That's not the case with these linked doc -- the links to the linked documents that we're talking about. And so absent an automated tool to connect those together, it would have to be a manual process at Apple.

And so I understand that the Government is pitching this as a narrow -- as a narrowing, but, in fact, the steps that it would require would be quite manual. And I can just walk the Court through what it would require.

Apple would first have to manually identify all the hyperlinks in produced documents and then determine whether those doc- -- whether the links in those documents link to another document and then make a determination based on the link itself whether the linked document might be relevant and then manually populate the metadata fields that plaintiffs are asking for with those potentially relevant hyperlinks.

In addition to that, we would then have to go search and see if any of the linked documents had already been produced. If they were produced, manually populate a separate metadata field with the corresponding Bates number of that produced document. And if they were not produced, create a log of the hyperlinked addresses themselves.

And so I understand that it's -- that the Government's proposal is different from simply saying Apple must produce all hyperlinked files, which has been rejected even most recently in another -- by another judge in this District, Judge Singh in the In re Insulin case. And so they're pitching this as a narrowing, but when you really think about what the process would actually require, it's quite a departure from what courts have done in other cases.

And so we think the better course, the most efficient one that will avoid the inevitable delay that the process I just painstakingly described is to just do this on a case-by-case basis. And that is what lots of courts have chosen to do with this sort of highly technical difficult issue is to have the parties meet and confer and make reasonable requests for linked documents once we get a better sense of what the hyperlinked documents that are actually going to be relevant and of interest to the parties.

And we think that's the best course to proceed, given that Apple doesn't have an automated tool to do this, and so --

THE COURT: Can it purchase one? Are they readily available, as the Government says?

MS. MILLER: My understanding is no. Not for -- not for the applications that Apple is using. And I just want to make a distinction: There are other platforms -- like, Google has a platform by which there is an automated tool. And that's just not what we're dealing with here, and so we wouldn't be in that position.

I do hear the Court that there may be additional information that Apple could provide on its burden, so if that would be helpful to the Court, we're happy to consider declarations on this just to hopefully resolve the issue and explain further the specific burden.

But I do want to stress that the lack of an automated tool has been recognized by courts and these are cited in our letter, the In re Insulin case, most recently in May 2024; In re Meta, other cases from the Northern District of California and the Southern District of New York.

THE COURT: We saw them.

But, you know --

MS. VAN KIRK: Your Honor --

THE COURT: -- just a second.

Bear in mind that I may give you the kind of schedule that behooves you to -- that pushes you to get an automated tool because it may be a lot of person-hours otherwise.

So, you know, this is something that Apple, rather than spending a lot of resources telling me why it can't, it probably should, behind the scenes, spend some time focusing on how it can.

But that's just my general guidance.

Ms. Van Kirk, do you want to -- go ahead, Ms. Miller --

(Simultaneous conversation)

THE COURT: Just one second. Let Ms. Miller finish because I just said something to her.

MS. MILLER: Thank you. We appreciate the Court's comments.

I just want -- I just want to be clear there is not an automated tool, as I understand it, that we could use based on the particular architecture of the applications that we're talking about.

And so I completely hear the Court wanting us to move as expeditiously as possible. I just think given the lack of an automated tool, the Government's proposal would actually make it slower than the process that we're proposing.

THE COURT: Ms. Van Kirk?

MS. VAN KIRK: Thank you, Your Honor.

We deeply appreciate the Court's guidance and direction on this.

If I may make just a couple of points. The first is that unfortunately I think the parties are really talking past each other, and that's despite our best efforts. Defendant, in many ways, is fighting a proposal that we're not suggesting. Plaintiffs' proposal isn't In re Insulin Litigation. It's not Nichols v. Noom. It's not the cases cited in their briefing. Those cases sought to have the producing party identify links in the production; then go back into the native system, find the linked files, export them, and attach them as family members. That's really nothing like the Government's proposal. We're not asking the defendant to go back into the native system. We're not

asking them to develop a tool.

As Your Honor said at the outset, we're asking just for a metadata export. And we're only requesting it for linked documents in the production.

Now, Ms. Miller went through --

THE COURT: What do you mean "linked documents in the production"?

MS. VAN KIRK: I should say collaborative documents, meaning we're only requesting this metadata export for relevant collaborative documents in the production.

THE COURT: But you're receiving the collaborative document in the production in your hypothetical.

So why would you also need that metadata separately produced? I don't understand that.

MS. VAN KIRK: Exactly as I went through at the beginning, without the metadata, we don't have the relationship. We might have -- and the relationship is really what's key for fact finding and for understanding what transpired.

THE COURT: I see. So if the collaborative document is produced, along with that production in whatever form, electronic, presumably, of the document you want the metadata that goes with that production.

MS. VAN KIRK: We want the ability to link the email that says "See this" on July 1st with the actual

document. We might have both, but there's going to be a lot of documents produced in this litigation when we have no way of telling what went to what. But Apple does. That's tremendous prejudice, and it impairs our ability to litigate.

THE COURT: But why can't you request it for discrete documents rather than requiring them to undergo that burdensome exercise every time.

MS. VAN KIRK: First off, the -- as Your Honor stated, again at the beginning, in general, the producing party bears the burden of providing information about its own documents. That's the standard.

And then, second, it's also prejudicial --

THE COURT: Although there are lines of cases and standards that say if it's unduly burdensome, if it's the equivalent of going, in the old days, to backup tapes, it doesn't have to be produced and there can be a cost-shifting in making a party do that.

MS. VAN KIRK: And respectfully, our proposal is not intended to do that because it's far narrowed from much of the case law and it's far narrowed from even what we saw at the outset in order to reduce these burdens on Apple.

And we also believe that it's very prejudicial and sometimes it's impossible to give Apple a set of the documents that we think are important, the key to our deposition, the key to an expert report, and then say pull

those links right before in the thick of the --

THE COURT: I doubt you'll do it right before.

MS. VAN KIRK: The way productions happen, you know, often the deadlines --

THE COURT: All right.

MS. VAN KIRK: -- that's certainly been part of our experience and part of the prejudice and the problem in other cases that have done this.

I want to return for a moment, Ms. Miller took you through what she listed in page 19 of their briefing of what they -- what Apple calls, like, "seven manual steps."

Your Honor, we don't understand how those steps are manual. Apple says that it needs to identify manually all hyperlinks in the documents to be produced. But any proficient user of e-discovery tools would do this automatically. It says it needs to evaluate whether a hyperlink links to another document.

We're not asking for that. Plaintiffs don't care and aren't asking defendant to determine if the link is dead or if it had a typo.

THE COURT: Okay. If you don't understand, I certainly don't understand. And this requires -- if you want me to call this, don't have me calling it in the dark. I think it's going to require a further transparent meeting between the Government and Apple.

And if you have to tee it up for Round 2 in front of me, you better submit it with burdens met, with I's dotted and T's crossed, e-discovery vendors consulted and so forth and present it in a digestible form to me. I'm no tech wiz. I'm not totally ignorant, but you're going to have to spoon-feed it a little bit on a basic level because I like to understand what I'm doing before I order something.

MS. VAN KIRK: I do -- we appreciate that, Your Honor. And forgive me for interrupting.

What I meant to say is not that we don't technically understand -- don't --

THE COURT: You don't understand where Apple's coming from. I understood that.

MS. VAN KIRK: Exactly. And that's not for want of asking. We have tried to work this out. And we really want to collaborate. And for months, you know, these protocol negotiations on ESI started over four months ago. And we've asked defendant how they'd manually identify hyperlinks in the production or what processing and review tools they use so that we can collaborate on solutions.

And we've offered to have our technical people and their technical people get on a call together. We've asked them these questions repeatedly, and --

THE COURT: Okay. Well, if they haven't done it before, they're going to do it now.

MS. VAN KIRK: Thank you, Your Honor.

THE COURT: And I'm confident they will.

Ms. Miller.

MS. MILLER: Your Honor, just to respond to that. We have engaged and will continue to engage with the Government on this issue. We've had multiple meet-and-confers. We've been up front about the automated tool -- the lack of an automated tool to do this. And so I just -- it's true the Government on Monday raised this issue of maybe additional meet-and-confer on this would be helpful to clarify where the parties are coming from, and we're certainly willing to do that.

But I think we just need the time. And so it's just not -- just to clarify, it's not the case that we're declining to speak about this or to engage with them. I just want to make that very clear for the Court.

THE COURT: Okay. Well, you'll have another chance, if they misunderstood your intentions.

So that's all I really want to do on that today.

Go back and confer.

And then just, you know, let's take a step back and look at the forest here. You know, this District has a lot of big cases. This is a big case. It's an important case. Every case is important. We have MDLs and all sorts of complex litigation here.

It concerns me that you've had this much trouble on three pro forma orders -- not that your concerns aren't legitimate. They are. But they're legitimate in a lot of cases, yet they don't bubble up to multiple-page, single-spaced letters to the Court to decide. You know, I want to get in there -- I'd love to -- I find this very interesting, but I frankly don't have the time to do it on every case. And I gave you a fair hearing today.

But when I see things -- and this is Judge Neals's business; it's not mine. But when I see the letters I see -- I've seen from you all about a technology tutorial, something in patent cases we see all the time, whatever goes on behind the scenes remains behind the scenes as far as the Court is concerned, we get a beautiful neutral presentation without a peep from the parties that helps the Court focus on technology -- I'm just telling you that you have to work better together because we simply don't have -- I'll spend -- I'll spend time on an interesting case, but I don't have the time to hand-hold and do a two-hour hearing on three pro forma orders -- and I say "pro forma" because they're negotiated without the Court's help in almost every single case no matter how big the case is.

So as I said, you're all here in good faith, but don't expect this level of attention on everything. Don't be this needy. Take matters into your own hands.

So I'll give you some time. You take the time you need, because, frankly, I'm seeing -- I really would like that motion to dismiss decided before I open formal discovery. I'll see how long it takes. I'll keep an open mind.

So you have time to work on these preliminary orders. You take the time you need. But just understand going forward that I expect a lot more cooperation, transparency and flexibility between counsel or you're, frankly, just going to wait. And I am not saying that and, you know -- because I would -- I would want to punish anyone. It's just that I put other things off so I could do this today, in a prompt manner. But I won't do that every time if I find that you're not working well together. Okay?

MR. ALLEN: We understand, Your Honor. And we thank the Court for its time and attention.

THE COURT: Okay. Great.

MR. LASKEN: Could I actually be heard for a minute on that?

THE COURT: Sure, Mr. Lasken.

MR. LASKEN: So, we obviously appreciate the Court's guidance.

I do think one challenge that we have here is when someone says "Answer 700 interrogatories," I can't in good faith commit the Government to do that or to reach a middle

ground on that.

And I think a lot of the positions here disclose the measures you use to stop foreign actors from hacking government systems through a private corporation.

You know, we are trying to work with Apple, and I want the Court to understand that.

But particularly where there's been a lack of deadlines, we haven't even been able to get Apple on the phone. And so we are doing our absolute best, and I want the Court to understand that. But at the same time, we can only -- I can't compromise on 350 interrogatories --

(Simultaneous conversation)

THE COURT: Okay. Well -- let's take that example. Not one interrogatory has served -- has been served or has been permitted to be served. And if the United States is treated as one entity, then they're limited to 25 interrogatories, not 400 or 700.

You're actually advocating a position to treat -- to allow separate discovery requests to agencies within the government. Interrogatories is a bad example, but there are other limitations that by wanting plaintiff to be defined as the Department of Justice, may inure to the Government's detriment.

So I am not going to have a debate with you. I have no doubt you're doing the best for your client in your

eyes.

But unfortunately, you're not the one who's going to ultimately decide the disputed issues. I or Judge Neals are. And I'm trying to tell you how the Government's being perceived and the parties in general are being perceived, out of fairness to you.

MR. LASKEN: I appreciate that, Your Honor. And I did not mean to overstep or suggest that. I was just trying to articulate that, you know, we are -- we are doing our best to work with what we can in the context of what is occurring.

THE COURT: Okay.

MR. LASKEN: -- if that sounded -- sounded --

THE COURT: I know you're trying to represent your client to the best of your ability, as is Apple.

Okay, everyone. Nice speaking with you. I'll see what you resubmit -- you know, I'll see what I get. I am not going to make any advance statements about what I'm going do. But it's not out of the realm of possibilities that you submit your respective views and I enter what I see fit, and it may be one of your views or neither of your views. Okay?

UNIDENTIFIED SPEAKER: Thank you very much, Your Honor.

THE COURT: Thank you, everyone. Take care. Bye.

(Conclusion of proceedings)

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 59 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

S/ *Sara L. Kern* 11th of October, 2024

Signature of Approved Transcriber Date

Sara L. Kern, CET**D-338
King Transcription Services, LLC
3 South Corporate Drive, Suite 203
Riverdale, NJ 07457
(973) 237-6080